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IN THE COURT OF APPEALS OF INDIANA

ROBERT W. EVANS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0610-CR-872
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0601-FB-2

June 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Robert W. Evans appeals the eight-year sentence he received after pleading guilty to class C felony illegal drug lab and class D felony maintaining a common nuisance. We affirm.

Issue

The issue is whether the trial court properly sentenced Evans.

Facts and Procedural History[1]

On January 13, 2006, the State charged Evans with class B felony cocaine possession, class A misdemeanor possession of paraphernalia, class C felony illegal drug lab, class A misdemeanor illegal storage of ammonia, and class D felony maintaining a common nuisance. On August 31, 2006, pursuant to a plea agreement, Evans pled guilty to the illegal drug lab and common nuisance charges in exchange for the dismissal of the remaining charges. The plea agreement also provided that Evans would admit to violating probation in three other causes and plead guilty to criminal mischief in a fourth cause, with that sentenceto be suspended and served concurrent to the sentence in this case. Sentencing was left to the trial court's discretion.

At the guilty plea hearing, Evans admitted that on or about January 11, 2006, he possessed anhydrous ammonia within a thousand feet of a school, with the intent to manufacture methamphetamine elsewhere. Evans stored the ammonia in a shed on the

[1] We note that Evans's counsel included Evans's pre-sentence report and psychological evaluation in the appellant's appendix. Indiana Administrative Rule 9(G)(1) states that the information therein "is excluded from public access and is confidential." Indiana Trial Rule 5(G)(1) requires that such documents be separately identified and "tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

property where he lived with his one- and two-year-old children. Evans also admitted to having knowledge that controlled substances and drug paraphernalia were used in his basement. At the sentencing hearing on September 27, 2006, Evans admitted that he stored the anhydrous ammonia in a thirty-gallon container. The trial court imposed concurrent executed sentences of eight years on the illegal drug lab charge and three years on the maintaining a common nuisance charge. Evans now appeals his sentence.

Discussion and Decision

The trial court's written sentencing order reads in pertinent part as follows:

> The Court finds as aggravating factors that the defendant has a history of criminal or delinquent activity, the defendant was on probation at the time of the instant offense, the defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility in that prior attempts at rehabilitation have been unsuccessful, and the defendant's behavior while incarcerated.
>
> The Court finds as mitigating factors the defendant has taken responsibility for his actions by entering a plea of guilty, and the defendant has sought treatment voluntarily.
>
> The Court further finds that the aggravating factors outweigh the mitigating factors.[2]

Appellant's App. at 135-36. The court imposed the maximum sentence on each count, to be served concurrently. *See* Ind. Code § 35-50-2-6 ("A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."); Ind. Code § 35-50-2-7 ("A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 ½) years.").

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[2] Evans incorrectly claims that the trial court failed to balance the aggravators and mitigators.

Sentencing lies within the trial court's discretion. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). Evans contends that the trial court abused its discretion in finding and balancing the aggravating and mitigating circumstances. We note that Indiana's sentencing scheme was amended effective April 25, 2005, more than eight months before Evans committed his crimes. Indiana Code Section 35-38-1-3 provides that if a trial court finds aggravators or mitigators at sentencing, it must make a statement of its "reasons for selecting the sentence it imposes." However, a trial court may impose any sentence authorized by statute or permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Although our supreme court has not yet interpreted the current version of this statute, its plain language appears to indicate that "'a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances[,]'" so long as the sentence is within the applicable statutory range. *Primmer v. State*, 857 N.E.2d 11, 17 (Ind. Ct. App. 2006) (quoting *Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App.2006), *trans. denied*), *trans. denied* (2007). Moreover, a trial court is not required to use the statutory advisory sentence as a starting point in its sentencing considerations. *See* Ind. Code § 35-50-2-1.3(a) (for purposes of felony sentencing, "'advisory sentence' means a guideline sentence that the court may *voluntarily* consider as the midpoint between the maximum sentence and the minimum sentence.") (emphasis added).

Even assuming, absent guidance from our supreme court, that we must continue to assess the trial court's finding and balancing of aggravators and mitigators, Evans's argument

fails. As a general matter, Evans contends that the crimes he committed did not create "a greater risk or danger to the public than that already factored into the penalty for the crime[s]." Appellant's Br. at 8 (citing *Burgess v. State*, 854 N.E.2d 35 (Ind. Ct. App. 2006)). We disagree. Evans admitted to storing a thirty-gallon container of anhydrous ammonia and to having knowledge about the use of controlled substances and drug paraphernalia on the property where he lived with his two small children. Evans himself acknowledged that his children "were very, very young at this point so they couldn't have gotten out on their own … if something bad would have happened[.]" Sent. Tr. at 22. These facts are more egregious than those that define the essential elements of the crimes.[3]

With respect to aggravators, Evans claims that the trial court ignored evidence that his behavior while incarcerated "improved significantly" after he was "placed on proper and necessary medication for his mental health issues." Appellant's Br. at 8. This claim is untrue. In reviewing a sentencing decision, we may consider the trial court's written and oral sentencing statements. *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). At sentencing, the trial court specifically told Evans, "[I]t's to your credit that the last six months you've been able to come under control with the medication you've been taking. It certainly was --- is a bad situation when you were in the jail prior to that." Sent. Tr. at 30.[4]

With respect to mitigators, we have stated that

[3] Evans also argues that he should receive favorable consideration because his crimes are nonviolent. Appellant's Br. at 9 (citing *Hammons v. State*, 493 N.E.2d 1250 (Ind. 1986), and *Buchanan v. State*, 699 N.E.2d 655 (Ind. 1998)). These cases say only that courts should consider the nature and circumstances of crimes in imposing and reviewing sentences; they do not differentiate between violent and nonviolent crimes.

[4] The "bad situation" included Evans flooding his cell twice, vandalizing property, and cursing at and disobeying jail staff.

> it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance. Although the court must consider evidence of mitigating factors presented by a defendant, it is neither required to find that any mitigating circumstances actually exist, nor is it obligated to explain why it has found that certain circumstances are not sufficiently mitigating. Additionally, the court is not compelled to credit mitigating factors in the same manner as would the defendant. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant *and* clearly supported by the record.

Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (citations omitted).

Evans asserts that the trial court should have considered his educational and vocational achievements and his National Guard service as mitigating factors. The State observes that Evans did not present these factors as significant mitigators at the sentencing hearing; consequently, they are waived. *See id*. ("A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal."). The State further notes that Evans's achievements relate primarily to the construction field, in which he no longer works. In fact, Evans was unemployed when he committed the instant offenses. Also, Evans was discharged from the National Guard in 1999 due to his conviction for two counts of burglary in Huntington County.

Evans also asserts that the trial court "failed to recognize [his] mental health issues as a mitigating factor for sentencing." Appellant's Br. at 10.

> Our supreme court has identified four factors "that bear on the weight, if any, that should be given to mental illness in sentencing." *Weeks v. State*, 697 N.E.2d 28, 30 (Ind.1998) (citing *Archer v. State*, 689 N.E.2d 678, 685

> (Ind. 1997)). Those factors are: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Id.*

Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), *trans. denied*.

Evans's psychological evaluation indicates that he suffers from bipolar disorder, schizophrenia, and attention deficit hyperactivity disorder. Now twenty-seven, Evans has suffered from mental illness since early adolescence and has been treated in both outpatient and institutional settings. At the time of his evaluation in September 2006, Evans was on medication that the psychologist deemed inadequate to treat his illness. The psychologist recommended that Evans receive a psychiatric evaluation, proper medication, "intensive substance abuse treatment[,]" "frequent and random drug testing[,]" and "[t]wenty-four hour monitoring." Appellant's App. at 60.

We agree with the State that the trial court did consider Evans's mental health issues as a mitigator in the context of his voluntarily seeking treatment for his illness. Also, as the State points out, Evans "has not shown that the present [crimes were] due to his inability to control his behavior, his limitations on functioning, the duration of his problems, or any other nexus with his mental problems." Appellee's Br. at 7. Indeed, the record indicates that Evans traded either anhydrous ammonia or the methamphetamine manufactured with that ammonia to support his drug habit. Sent. Tr. at 22. According to the pre-sentence report, Evans has not received substance abuse counseling since 1995. Appellant's App. at 51. We find merit in the State's contention that "incarceration may be the best way to deal with

[Evans's] mental problems and addictions because the only time his mental problems have been stabilized was during prior incarceration" and because his psychological evaluation recommends twenty-four-hour monitoring. Appellee's Br. at 8. In light of the foregoing, we cannot say that the trial court gave insufficient consideration to Evans's mental health issues.

Evans further contends that the trial court gave insufficient weight to his guilty plea, in that the State anticipated calling over twenty witnesses and introducing numerous exhibits at trial. We note, however, that "[a] guilty plea is not automatically a significant mitigating factor." *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999) (footnote omitted). "For instance, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (citing *Sensback*, 720 N.E.2d at 1165), *trans. denied* (2006). Here, the State agreed to dismiss three pending charges, including a class B felony cocaine possession count, and further agreed that Evans's sentence for criminal mischief in another case would be suspended and served concurrent to the sentence in this case. Moreover, there is no indication that the State's case against Evans was weak. Consequently, we find no abuse of discretion.

Evans also claims that the trial court "completely ignored evidence of the undue hardship of incarceration" on his family. Appellant's Br. at 11. The record indicates that although Evans cared for his young children while their mother worked, his crimes involved the use and storage of dangerous and illicit substances on his property and in his home. Also,

Evans fails to explain how an eight-year sentence would result in any greater hardship to his family than a lesser sentence. Under these circumstances, we cannot say that Evans has established that "the mitigating evidence is both significant *and* clearly supported by the record." *Pennington*, 821 N.E.2d at 905. In sum, we cannot say that the trial court abused its discretion in finding and balancing aggravators and mitigators.

Finally, Evans asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Evans makes no specific argument regarding these considerations, however. The record reflects that Evans stored a substantial amount of anhydrous ammonia and allowed the use of illegal drugs in close proximity to his young children. Evans's criminal history is extensive, with a juvenile true finding for burglary and convictions for various felonies and misdemeanors, including burglary, theft, check deception, and battery on a police officer. Evans received no good-time credit during his previous incarceration, and he was on probation in three cases and on bond in a fourth when he was arrested for the instant crimes. During his incarceration for these offenses, Evans vandalized his cell, flooded it twice, and cursed at and disobeyed jail employees. Evans also has a lengthy history of substance abuse, for which he has not received treatment since 1995. Based on this evidence, we cannot say that Evans's eight-year sentence is inappropriate.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.